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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-815

Ira Coleman Roberts
Petitioner

V.

State of Arkansas
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARKANSAS

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Ira Coleman Roberts
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State of Arkansas
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Petitioner, Ira Coleman Roberts, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Arkansas entered on the 27th day of August, 1973.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas affirming the judgment of the Miller County, Arkansas Circuit Court is reported as, *Roberts v. State*, 497 S.W.2d 666 (Ark. 1973). The opinion is reproduced as

Appendix A to this petition.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas, reported as 497 S.W.2d 666 and reproduced herein as Appendix A was entered on July 9, 1973, and petitioner's petition for rehearing was denied on August 27, 1973. A motion for stay of mandate for ninety days or until action is completed by this court was filed on August 14, 1973 and was granted by the court. The Supreme Court of the State of Arkansas granted petitioner's motion allowing the petitioner to remain free on bail pending the filing of the Writ of Certiorari in this court.

The jurisdiction of this court is invoked under 23 U.S.C. S 1257 (3).

QUESTION PRESENTED

1. Whether the petitioners due process rights guaranteed by the Constitution of the United States were violated by the State of Arkansas in allowing the Prosecution to make repeated use of a photograph of the petitioner's alleged accomplice despite the fact that the photograph was never introduced into evidence by the Prosecution and despite the fact that the alleged accomplice was not on trial with the petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States of America states in part:

"No person shall *** be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The appellant, Ira Coleman Roberts, was charged, tried and convicted of the crime of grand larceny. The information charged that on or about June 2, 1971, Ira Coleman Roberts stole $53,200.00 from Charles J. Peacock and James Peacock in violation of Section 41-3901 of the Arkansas Statutes. The case was tried on September 13, 1972, and resulted in a jury verdict of guilty, the jury assessing punishment at 14 years. The trial court pronounced sentence in conformity with the jury's verdict. A timely notice of appeal was filed and perfected.

The Supreme Court of Arkansas affirmed the judgment of the Circuit Court of Miller County and thus this petition for Writ of Certiorari.

The testimony can be summarized as follows:

Marshall May Powell met and did business with Charles J. Peacock for approximately one year prior to June 2, 1971 (T. 55). A month or so prior to June 2, 1971, Charles Peacock introduced Marshall May Powell to his son, Jim Peacock (T. 14). Jim Peacock testified that Powell seemed very interested in his operation and knew quite a bit about it (T. 14). Jim Peacock said that during subsequent meetings he and Powell discussed buying grain for feed at ridiculously low prices. Peacock testified that Powell said he had contacts with some insurance

companies where he could get wet grain very cheaply. Approximately a week before June 2, 1971, Peacock said that Powell called him and said that he had located some grain that Peacock would be interested in (T. 16). Jim Peacock testified: Powell told him that to purchase the grain would require cash and that his father Charles J. Peacock objected to taking that much cash to purchase the grain. Jim Peacock said that Powell told him that he would have to put the cash in a bank close to where the grain would be located (T. 17). Jim Peacock and his father arranged to obtain $50,000.00 from two different banks in one hundred dollar bills (T. 17). In a later conversation with Powell the men agreed to meet him in Texarkana on June 2, 1971 (T. 18). The trip to Texarkana on June 2, 1971, was made by Jim Peacock, Charles J. Peacock, and Eddie Driver, an employee of the Peacocks who drove down in a separate vehicle. The three men arrived at the Holiday Inn in Texarkana at approximately 9:00 or a little bit before on the morning of June 2, 1971, and were met by Marshall May Powell. The Peacocks were both very tired and in fact had switched drivers once coming from near Newport, their home, to Texarkana. When they got to the Holiday Inn and met with Powell they were introduced to a man called "Doc Wilson" (T. 20). Powell took the Peacocks into the Holiday Inn restaurant and they drank coffee. At this time Jim Peacock testified that he had $20,000.00 in one hundred dollar bills in his shirt and his father testified that he had $30,000.00 in one hundred dollar bills in his boots (T. 21). They also had $3,000.00 under the seat of their car in cash (T. 21). Charles Peacock told Powell that he was going to have to lay down because he was about beat. Powell showed them where his room was and helped both Peacocks get into bed. The room was located right across from the Manager's Desk near the Lobby (T. 22). Eddie Driver went to another room down

the hall (T. 23).

The Peacocks awoke about 1:00 and both testified that their money was gone. The testimony reflects that the room smelled like creosote dip and that there were aluminum pans, paper cut to the size of currency, a wooden press which was subsequently identified as a money making machine, and other items in the room, including wet towels belonging to the Motel. Jim Peacock's money that he had in his billfold was not missing nor was a diamond ring which Charles J. Peacock had on or a gun which Charles Peacock had in his car. Peacock testified that the $50,000.00 in cash plus the $3,000.00 from the car was missing. The men stated that they reported the theft to the management and then went down to get some sandwiches to eat while waiting on the police (T. 27).

Dorothy Cochran testified that she was a maid at the Holiday Inn on June 2, 1971. She identified Charles J. Peacock as the man who came to her about 9:00 a.m. on June 2, 1971, and told her that he did not want his room cleaned that day because he did not want to be disturbed, that he had some paper work to do. She said that he also asked for extra towels and said that that was all that he would need. She stated that she gave him the extra towels (T. 126).

Danny Sewell, a Texarkana policeman, testified that he was on duty June 2, 1971, and was summoned to the Holiday Inn after a report had been made. He recalled that he was summoned to the Holiday Inn at approximately 2:20 p.m. (T. 105). He further testified that in the room occupied by the Peacocks he found a black leather type

suitcase, two wooden type presses made of four pieces of plywood and four bolts, several bottles of strong smelling chemicals which reminded him of creosote, three new aluminum pans approximately 10 x 6 inches, two or three wet towels lying on the floor, a large stack of very thin paper cut in different sizes, one size of paper cut exactly the size of United States currency (T. 107-108).

As can be seen from the above statement, the person being tried was the absent person, that is Marshall May Powell. The testimony presented by the State of Arkansas concerned Powell and his activities in connection with this alleged crime. The State further made use of a photograph reporting to be Marshall May Powell, a/k/a Bill Taylor, by asking various witnesses to identify the photograph as a person who contacted them. The use of the photograph was objected to and the photograph was never introduced into evidence. The State used the photograph in the testimony of at least two of their witnesses, both of whom are law enforcement officials, Jack Ursery, a Sergeant in the Criminal Investigation Division of the Arkansas State Police and Danny Sewell, a Texarkana Arkansas policeman. It is the contention of the petitioner that by allowing two police officers to testify concerning a photograph of a person not on trial during the trial of his alleged accomplice raises such an inferrence of guilt as to prejudice the petitioner and deny him a fair and impartial trial and due process of law as guaranteed by the United States Constitution.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be allowed because a state court has decided a federal question of substance in a way not in accord with the reasoning of decisions of this

court.

Although the Petitioner is not aware of any cases directly on these facts, this case is somewhat analogous to the pre-trial identification cases by line-up and photograph because those cases point out the possibility of misidentification and the resulting prejudice to the defendant and the care that must be taken in preserving the defendant's rights. The way the photograph was used and the resulting prejudice to the defendant can best be observed by a review of the trial transcript.

During the examination of Jim Peacock the following occurred:

"Q. Mr. Peacock, I show you a photograph and ask you if you can identify that photograph? (Handing)

"A. (Examining) Yes, that's old Bill Taylor.

"Mr. Arnold: All right, (hands to Mr. Moore for examination.)

"Mr. Moore: I would object to the introduction of the photograph.

"Mr. Arnold: Your Honor, at this time I would like to introduce this photograph as State's Proposed Exhibit No. 1, and we can tie this photograph . . .

"The Court: Mark it for identification at this time.

"Mr. Arnold: For identification, all right.

At this point State's proposed Exhibit No. 1 is marked

for identification.

"By Mr. Arnold:

"Q. All right -

"Mr. Moore: Just a moment, I object to the introduction of this photograph. It is totally irrelevant to the case on trial.

"The Court: It's being marked for identification purposes at this time.

"Mr. Moore: Are you going to try to introduce it?

"Mr. Arnold: I'm going to introduce it later, or try to introduce it later.

"Mr. Moore: All right."

The state again presented the photograph in the following manner during the testimony of Jack Ursery, a Sergeant in Criminal Investigation Division of the Arkansas State Police:

"Q. All right, Mr. Ursery, I show you proposed State's Exhibit No. 1 and ask you if you can identify that person? (Showing)

"A. (Examining) I can.

"Q. All right, and who is that person?

"A. This is Marshall May Powell.

"Q. Do you know Mr. Powell personally?

"A. I know Mr. Powell personally.

"Q. And that is who this is?

"A. That is who that photograph is, yes, sir.

"Q. Do you know a Bill Taylor?

"A. Do not.

"Q. Is that Bill Taylor?

"A. That's Marshall May Powell.

"Mr. Arnold: I want to re-offer this photograph at this time.

"The Court: I will take it into consideration. I will hear you gentlemen later out of the hearing of the jury" (T. 47-48).

The photograph was again used without introducing it during the testimony of Eddie Driver as follows:

"Q. I show you State's Exhibit No. 1 - who is that? (Handing)

"A. (Examining) Well, I know him as Bill Taylor.

"Q. That's Bill Taylor . . . " (T. 97).

The State used this photograph in the testimony of a

second policeman when they asked Danny Sewell, a Texarkana policeman, to identify the photograph in the following manner.

"Q. I don't know whether you know this individual or not, but I will ask you. (Handing exhibit) Do you know this fellow?

"A. (Examining) Yes, sir.

"Q. Who is that?

"A. Marshall May Powell.

"Q. Referring to State's Exhibit 1.

"Mr. Moore: I have objected to it. You haven't introduced it.

"Mr. Arnold: I'm not going to introduce it unless you want to. Pass him." (T. 109-110).

The photograph was also used by the State during the cross-examination of Dorothy Cochran at pages 129 and 130 of the transcript.

It is very clear from reading the above quoted portions of the transcript that the only reason that the State had to show the photograph to the various witnesses was to tell the jury that the alleged co-conspirator of the defendant's was well known by the police by another name and that he was using an alias at the time that the alleged crime took place. Most of the testimony during the trial concerned Marshall May Powell and not the defendant and

it is apparent to petitioner that the inferences of guilt that were presented to the jury by the use of the photograph of a person who was not on trial but who was known by the police by one name and by the other witnesses by another name so prejudiced the petitioner that he was denied a fair and impartial trial and due process of law.

It is impossible to minimize the prejudicial impact that the use of this photograph made on the members of the jury. Two of the prosecution's witnesses, Jack Ursery, an employee of the Criminal Investigation division of the Arkansas State Police, and Dan Sewell, who is employed by the Criminal Division of the Texarkana, Arkansas, Police Department, both testified (T. 41 and 103) that they could identify the individual in the photograph as one Marshall May Powell. It can readily be seen from the transcript that the testimony of Sergeant Ursery was used by the prosecution for the sole purpose of identifying the individual in the photograph even though the photograph was never introduced into evidence. The testimony of this officer regarding the individual in the photograph made it clear to the jury that the individual was well-known by the Arkansas State Police. The testimony of Detective Sewell further confirmed this implication.

The case of *Simmons v. United States*, 390 U.S. 377 (1967), and the cases that follow certainly point out this Court's concern for possible prejudice that would result from the use of a photograph and the care that must be taken to assure fairness. The use of the photograph during the trial was certainly impermissibly suggestive of who the picture was of and if there was a misidentification of Marshall May Powell the resulting prejudice to the petitioner was certainly overwhelming.

Petitioner contends that by use of the photograph of someone else in petitioners trial which was identified by the police as being a photograph of Marshall May Powell an inference of guilt arises because Marshall May Powell was so well known by the police and because other witnesses identified the man in the picture as being Bill Taylor. The Courts have held that when the police are the ones who isolate or focus on a particular individual in a line-up or photographic identification case, an inference of guild arises. *United States v. McNamara*, 422 Fed. 2d 499 (1st Cir., 1970). Petitioner contends that the same is true when the police, during the trial in the presence of the jury, testify to their knowledge of an individual, as was done here.

CONCLUSION

Petitioner contends that the Petition for Writ of Certiorari should be granted because of the denial of due process of law and a fair and impartial trial by the State of Arkansas.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. CR 73-20

Opinion Delivered Jul. 9, 1973

Ira Coleman Roberts, Appellant

Appeal from Miller Circuit Court; John W. Goodson, Judge

V.

State of Arkansas, Appellee

AFFIRMED

JOHN A. FOGLEMAN, Justice

This appeal comes from the conviction of Ira Coleman Roberts of the crime of grand larceny. Since one of his points for reversal is the contention that the evidence is not sufficient to support the verdict, we will state the evidence in the light most favorable to the state. The state's evidence was virtually uncontradicted.

The prosecuting witnesses in this case, James Peacock and Charles Peacock, are prosperous farmers from the vicinity of McCrory, Arkansas. They not only had farming operations, but also engaged in various other related and unrelated activities such as purchasing wet grain and operating a salvage business. Sometime in 1970 or 1971 Charles Peacock began having dealings with a man known to him as Bill Taylor, whose photograph was later

identified as being that of Marshall May Powell. Taylor expressed interest in and knowledge about the Peacocks' grain storage facilities, and in June of 1971 the Peacocks said that he informed them that he could introduce them to individuals in Texarkana, Arkansas, who had large quantities of "wet grain" to sell for amounts substantially less than the prevailing market rate. However, Taylor told them that these individuals would deal only in cash. Based on this information, the Peacocks withdrew $50,000 in $100 bills, in spite of the suggestion of the two bankers from whom they obtained the money that they use cashier's checks, and proceeded to Texarkana, Arkansas, on June 2, 1971, where they met Taylor and appellant Roberts, who was introduced to them as "Doc" Wilson, at about 9:00 a.m. at a motel. In the introduction, Wilson was described as an associate who had been working with Taylor. The Peacocks said their journey left them extremely tired, so Taylor suggested they have a cup of coffee and invited them to a table already set up with a pot of coffee. At that time, Jim Peacock had $20,000 in his shirt and $30,000 was in Charles Peacock's boots. $3,000 was left under the seat of their car. Roberts then went to the motel office to register for rooms because, he said, they might be there for some time. It was shown that Roberts procured two rooms, one in the name of George E. Wilson, and one in the name of Eddie Driver, an employee of the Peacocks who accompanied them to Texarkana in a separate vehicle. Roberts (Wilson) then rejoined the Peacocks and Taylor in the cafe. Taylor did not drink any of the coffee. After finishing their coffee, the Peacocks became very sleepy and wanted to lie down and rest. Taylor offered them his room, the one which Wilson (Roberts) had just reserved, and all four went to that room. Appellant sent Driver to the other room, suggesting

that he take a nap. Jim Peacock testified that after entering the room he and the elder Peacock lay on the two beds. He said that he felt real drowsy, carefree and irresponsible, and that, in walking, he felt like he was floating. He also testified that he remembers seeing appellant "kind of petting my dad and feeling sorry for him," and saying, "Mr. Peacock, take it easy and relax." Charles Peacock testified similarly, and added that appellant helped him take off his boots. When the two Peacocks went to sleep, Charles still had the $30,000 in $100 bills in his boots and his car keys in his pocket, and Jim had $20,000 in $100 bills in his shirt. Upon awakening some four hours later, Jim Peacock, finding his shirt unbuttoned and money gone, awakened his father. They discovered that not only had Taylor and Wilson departed, but all their money was also missing and someone had left some aluminum pans, a wooden press, a quantity of paper, some of which had been cut to the size of currency, a black suitcase, and other paraphernalia in the room. Wet hotel towels were on the floor. Also, both Peacocks sensed a distinct odor characterized as being like "creosote dip." The Peacock car keys were on a table in the room.

When the Peacocks arrived at the motel, the older Peacock parked their car next to the automobile Taylor had been driving when he came to the Peacock farm. Taylor was present and supervised the re-parking of the Peacock vehicle because Charles Peacock had parked without regard to the parking guidelines. Charles Peacock locked the car when he got out of it. It was locked after the disappearance of Taylor (Powell), Wilson (Roberts) and the Peacock currency. The Taylor vehicle had also disappeared.

The investigating police officer described the memory of the Peacocks as "very blurry" when he first interviewed them after they had given the alarm upon discovering the disappearance of Taylor and Wilson and their money. Appellant offered only two witnesses. One of them was a motel employee, who said that Charles Peacock had told her he did not want his room cleaned because he did not want to be disturbed in doing some paper work. He also asked her for some extra towels. A waitress testified that when the older Peacock ordered sandwiches he smelled like creosote.

Appellant alleges only two points as error. We find no reversible error. Appellant first contends that the use by the state of a photograph of one Marshall May Powell was reversible error. The photograph was used by the prosecution to establish the true identity of Bill Taylor and to connect the appellant with the other party to the alleged crime. Both Charles and Jim Peacock identified the person photographed as Bill Taylor and appellant as "Doc" Wilson. Eddie Driver also said that the photograph was of Bill Taylor. It served to show that both Powell and his alleged confederate were using fictitious or assumed names in their dealings with the Peacocks. Appellant takes issue with the fact that the state did not formally introduce this photograph into evidence, and argues that it was irrelevant. No objection was made to the identification of Bill Taylor made by the two Peacocks and Driver or to the testimony of two police officers who said that the man was actually Marshall May Powell. We do not see how this failure prejudiced the appellant in any way. Even if the photograph had been admitted and was irrelevant, the appellant has not demonstrated how he was prejudiced either by the state's failure to introduce it or by its claimed irrelevancy. The only suggestion of prejudice

was that the testimony showed that the individual pictured was well known by the Arkansas State Police. There was no evidence to show how the officers became acquainted with this person, and we do not find any implication that these officers were acquainted only with criminals. Also, when the photograph was identified by the last witness for the prosecution, the appellant was apparently asked if he wanted it introduced. The record is silent as to any response by the appellant.

Appellant's other contention is that the verdict is not supported by substantial evidence. With this we also cannot agree. While the evidence was basically circumstantial, the recitation of the facts as gleaned from the testimony of the Peacocks is sufficient. The appellant was placed at the scene of the crime; his companion knew where the Peacock vehicle was parked; he was shown to have possession of the elder Peacock's boots which contained part of the stolen money; he took care to exclude Driver from the coffee table and the motel room where the Peacocks were; the use of aliases and the permissible inference that the coffee was "spiked," and the virtual exclusiveness of the opportunity of appellant and Taylor to commit the theft, and the disappearance of the money, Powell, Roberts and the Powell car during the time the Peacocks were soundly napping were all circumstances from which the jury could have concluded that appellant was a participant in the crime. Circumstantial evidence is sufficient to support a criminal conviction. *Parker v. State*, 252 Ark. 1242, 482 S.W.2d 822; *Lancaster v. State*, 204 Ark. 176, 161 S.W.2d 201. The circumstances here meet the test as we have previously applied it. See *Dolphus v. State*, 248 Ark. 799, 454 S.W.2d 88; *Lancaster*

v. State, supra; *Jefferson v. State*, 89 Ark. 129, 115 S.W. 1140.

The judgment is affirmed.

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vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 497 S.W. 2d 666 and is reproduced at page 14 of the Petition.

JURISDICTION

Petitioner invokes the Court's jurisdiction under: "23 U.S.C. S 1257(3)." Assuming that the printing should have read 28 rather than 23 U.S.C. respondent is willing to stipulate that the jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether reference to a photograph of petitioner's alleged accomplice during trial in State Court violated Petitioner's constitutional right to due process of law.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V. to the United States Constitution.

STATEMENT

The petitioner was convicted of the crime of grand larceny for having stolen approximately $53,000.00 of currency from James and Charles Peacock, two (2) McCrory, Arkansas, farmers.

At trial the State showed the photograph of an alleged accomplice to several witnesses. The Peacocks' and their employee identified the photograph as that of "Bill Taylor," while two police officers identified the same photograph as that of "Marshall May Powell." Presumably the point to be made was that petitioner (identified by the Peacocks as "Doc Watson") and his accomplice used aliases in the commission of the crime.

No objection was made to the identification at trial. The photograph was not introduced into evidence.

The Supreme Court of Arkansas affirmed the conviction of petitioner, noting that the identifications were not prejudicial and that no objections were made to them during the trial. There is no indication that a Federal question was addressed to the Arkansas Supreme Court.

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT. NONE OF PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED AT TRIAL, AND NO FEDERAL QUESTION WAS PRESENTED TO THE COURT BELOW.

Respondent would respectfully submit at the outset that the decision in the instant case in no way conflicts with any Federal statute or any decision by this or any other Federal Court. The opinion of the Court below did not address the "due process" argument which petitioner attempts to raise in his petition, but rather decided the question on separate and independent State grounds. Specifically, the Arkansas Supreme Court held that the use of the photograph of which petitioner complains was nonprejudicial and was not objected to at trial and that therefore no ground for reversal existed.[1]

Even if this Court should find that the "due process" issue was addressed below, nevertheless it is urged that no denial of due process is shown by petitioner.

Petitioner cites *Simmons v. U.S.*, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967, for the proposition that this Court was ". . . concern[ed] for possible prejudice that could result from the use of a photograph . . ." and argues that: "The use of the photograph during the trial was certainly impermissibly suggestive of who the picture was of . . . ."

Simmons, supra, involved identification of suspects before trial by means of photographs which the govern-

[1]The trial transcript clearly reveals that objections were made only to the admissibility of the photograph, not to the identification of the accomplice.

ment refused to produce at trial. The photograph in question at present did not pretend to be that of petitioner and it was not used for pre-trial identification. Clearly, *Simmons* is not even remotely applicable to the issue presented here.

Petitioner's only other citation is to *U.S. v. McNamara*, 422 F. 2d 499. Petitioner apparently cites *McNamara* for the proposition that ". . . when the police are the ones who isolate or focus on a particular individual in a line-up or photographic identification case, an inference of guild (sic) arises."

Respondents urge that petitioner's interpretation of the *McNamara* holding is erroneous since that case dealt with a situation in which a witness identified one picture of a suspect and called for other photographs, which were provided. At any rate *McNamara, supra*, is no more applicable to the instant case than is *Simmons* and for exactly the same reasons.

Petitioner notes that he ". . . is not aware of any cases directly on these facts . . ." and respondent's research has uncovered none. No demonstration of prejudice has been made and the "due process" argument has not been elaborated upon.

On the basis of the foregoing, respondent argues that no substantial Federal question has been raised, that the decision below was based on independent grounds of state law and did not address a Federal due process question, that the decision by the Arkansas Supreme Court is clearly correct and does not conflict with any Federal case or statute or with the Constitution of the United States, that no Constitutional rights of petitioner were at any time violated and that therefore no basis has been presented for the granting of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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